

1 David K. Callahan, P.C. (IL 620227), dcallahan@kirkland.com
 2 KIRKLAND & ELLIS LLP
 3 300 N. LaSalle Street
 4 Chicago, Illinois 60654
 Telephone: 312-862-2000
 Facsimile: 312-862-2200

Attorney For Plaintiffs and Counter-defendants
 5 BAXTER HEALTHCARE CORPORATION,
 6 BAXTER INTERNATIONAL INC., and
 BAXTER HEALTHCARE SA

7 Maureen K. Toohey (SBN 196401), mtoohey@toohey.com
 TOOHEY LAW GROUP, LLC
 8 One Financial Center, 15th Floor
 Boston, Massachusetts 02111
 9 Telephone: (617) 748-5511

Attorney for Plaintiff and Counter-defendant
 10 DEKA PRODUCTS LIMITED PARTNERSHIP

11 Juanita R. Brooks (SBN 75934), jbrooks@fr.com
 FISH & RICHARDSON P.C.
 12 12390 El Camino Real
 San Diego, California 92130
 13 Telephone: (858) 678-5070
 14 Facsimile: (858) 678-5099

Attorney for Defendants and Counter-claimants
 15 FRESENIUS MEDICAL CARE HOLDINGS,
 16 INC. AND FRESENIUS USA, INC.

17 **UNITED STATES DISTRICT COURT**
 18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 19 **SAN FRANCISCO DIVISION**

20 BAXTER HEALTHCARE CORPORATION,
 21 BAXTER INTERNATIONAL INC., BAXTER
 HEALTHCARE SA, AND DEKA LIMITED
 PARTNERSHIP,

22 *Plaintiffs and Counter-defendants,*

23 vs.

24 FRESENIUS MEDICAL CARE HOLDINGS,
 25 INC., d/b/a FRESENIUS MEDICAL CARE
 26 NORTH AMERICA, and FRESENIUS USA,
 INC.,

27 *Defendants and Counter-claimants.*

Case No. C 07-01359 PJH (JL)

**STIPULATION OF REMOVAL OF
 LIBERTY CYCLER FUNCTIONALITY
 RELATING TO, AND DISMISSAL OF,
 U.S. PATENTS NO. 5,438,510; 6,503,062;
 AND 6,808,369**

1 WHEREAS, Defendants have removed functionality from the Liberty™ peritoneal
2 dialysis cyclers (as reflected in its current software, version 2.4.7) relating to the basis for
3 Plaintiffs’ assertion of the claims of U.S. Patents No. 5,438,510 (relating to alarms and line
4 check) and 6,503,062 and 6,808,369 (relating to head height estimates and adjustments) as
5 reflected in the expert reports of Jack Ganssle and William Durgin, dated April 24, 2009, and as
6 Defendants stated in Defendants’ Supplemental Responses to Baxter Plaintiffs’ Interrogatories
7 Nos. 1 and 9, dated May 12, 2009;

8 WHEREAS, Mr. Ganssle and Dr. Durgin identified a functionality in certain versions of
9 the Liberty™ Cycler source code, which they refer to as “static patient pressure” as meeting the
10 limitations “and wherein the controller estimates, based on information received from the
11 transducer, a relative elevation between the fluid control device and the distal end” recited by
12 claim 1 of the ‘369 Patent, and “the controller receiving information from the transducer,
13 estimating a relative elevation between the control device and the distal end based on the
14 information received from the transducer” recited by claim 7 of the ‘369 Patent;

15 WHEREAS, the Fresenius Defendants disagree with the opinions expressed by Mr.
16 Ganssle and Dr. Durgin regarding the functionality they refer to as “static patient pressure,” but
17 nonetheless removed the functionality from version 2.4.7 of the Liberty™ Cycler source code
18 and agree not to include this functionality or mere colorable variations of the functionality in the
19 Liberty™ Cycler before the ‘369 Patent expires;

20 WHEREAS, Mr. Ganssle identified a functionality in certain versions of the Liberty™
21 Cycler source code, which he refers to as “initial pressure offset” as meeting the limitations
22 “calibrating the means for measuring [the] pressure” recited by claims 1 and 10 of the ‘062
23 Patent, and “calibrating the pressure transducer” recited by claims 16 and 21 of the ‘062 Patent.

24 WHEREAS, the Fresenius Defendants disagree with the opinion expressed by Mr.
25 Ganssle regarding the functionality he refers to as “initial pressure offset,” but nonetheless
26 removed the functionality from version 2.4.7 of the Liberty™ Cycler source code and agree not
27 to include this functionality or mere colorable variations of the functionality in the Liberty™

1 Cyclers before the '062 Patent expires;

2 WHEREAS, Mr. Ganssle identified a functionality in certain versions of the Liberty
3 Cyclers source code, which he refers to as “Drain rate too low,” in combination with what he
4 identifies as the “flow-based drain alarm” functionality as satisfying the limitation “means for (i)
5 continuing system operation for a predetermined time period in response to the second alarm
6 signal; (ii) canceling the second alarm condition without user intervention when, after the
7 predetermined time period, system operation satisfies the second set of criteria; and (iii)
8 initiating a first alarm condition when, after the predetermined time period, system operation
9 fails to satisfy the second set of criteria” recited by claim 1 of the '510 Patent;

10 WHEREAS, the Fresenius Defendants disagree with the opinion expressed by Mr.
11 Ganssle regarding the functionality he refers to as “ Drain rate too low,” but nonetheless
12 removed the functionality from version 2.4.7 of the Liberty™ Cyclers source code and agree not
13 to include this functionality or mere colorable variations of the functionality in the Liberty
14 Cyclers before the '510 Patent expires;

15 WHEREAS, Mr. Ganssle identified functionalities in certain versions of the Liberty
16 Cyclers source code, which he refers to as “line check” and “patient line check,” as satisfying the
17 limitation “control means operative, in response to the first command signal, for operating the
18 pumping means to attempt to move liquid in the tubing from the pumping means toward the
19 source and, if successful, registering an empty source condition and, if not successful, registering
20 an occluded source tubing condition” recited by claim 9 of the '510 Patent and “operating the
21 pump mechanism in response to the first command signal to attempt to move liquid in the tubing
22 from the pumping mechanism toward the source and, if successful, registering an empty source
23 condition and, if not successful, registering an occluded source condition” recited by claim 20 of
24 the '510 Patent.

25 WHEREAS, the Fresenius Defendants disagree with the opinion expressed by Mr.
26 Ganssle regarding the functionalities he refers to as “line check” and “patient line check,” but
27 nonetheless removed the functionalities from version 2.4.7 and earlier versions of the Liberty™

1 Cyclor source code and agree not to include these functionalities or mere colorable variations of
2 these functionalities in the Liberty™ Cyclor before the ‘510 Patent expires; and WHEREAS,
3 separately and apart from the foregoing considerations relating to the ‘510, ‘062 and ‘369
4 patents, the parties agree to dismiss all claims and counterclaims with respect to claims 21, 22,
5 24, 25, 26, 28, 29 and 30 of U.S. Patent No. 5,421,823 and claim 40 of U.S. Patent No.
6 5,431,626;

7
8 NOW, THEREFORE, the parties and their counsel of record stipulate as follows:

- 9 • Defendants agree that they will not make, use, sell, or offer for sale within the United
10 States or import into or export from the United States any peritoneal dialysis machine
11 with both the “Drain rate too low” functionality and the “flow-based drain alarm”
12 functionality, the “line check” functionality, or “patient line check” functionality—or
13 mere colorable variations of the functionality removed from the Liberty™ peritoneal
14 dialysis cyclor software—as claimed in U.S. Patent No. 5,438,510 until after the
15 expiration of U.S. Patent No. 5,438,510;
- 16 • Defendants agree that they will not make, use, sell, or offer for sale within the United
17 States or import into or export from the United States any peritoneal dialysis machine
18 with the “static patient pressure” or “initial pressure offset”-functionalities—or mere
19 colorable variations of the functionality removed from the Liberty™ peritoneal
20 dialysis cyclor—as claimed in U.S. Patents No. 6,503,062 and 6,808,369 until after
21 the expiration of U.S. Patents No. 6,503,062 and 6,808,369;
- 22 • All claims, defenses and counterclaims relating to U.S. Patents No. 5,438,510;
23 6,503,062; and 6,808,369 shall be dismissed, without prejudice, from the instant
24 litigation, with each party to bear its own costs and attorneys’ fees as to such claims,
25 defenses and counterclaims;
- 26 • The parties agree that this stipulation is not an injunction but reserve all rights and
27 remedies to enforce its terms; and

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- All of Plaintiffs' claims with respect to claims 21, 22, 24, 25, 26, 28, 29 and 30 of U.S. Patent No. 5,421,823 and claim 40 of U.S. Patent No. 5,431,626 shall be dismissed with prejudice, and all of Defendants' defenses and counterclaims with respect to such claims of the '823 and '626 patents shall be dismissed without prejudice, with each party to bear its own costs and attorneys' fees as to such claims, defenses and counterclaims.

IT IS SO ORDERED.

Dated: 5/28/09



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May 27, 2009

By: /s/ David K. Callahan /s/

KIRKLAND & ELLIS LLP
David K. Callahan, P.C. (IL 620227)
Garret Leach (*pro hac vice*)
Mary Zaug (*pro hac vice*)
200 East Randolph
Chicago, Illinois, 60601
Telephone: 312-861-2000
Facsimile: 312-861-2200

Robert G. Krupka (SBN 196625)
777 South Figueroa Street
Los Angeles, California 90017
Telephone: 213-680-8400
Facsimile: 213-680-8500

Russell Tonkovich (SBN 233280)
555 California Street
San Francisco, California, 94104
Telephone: 415-439-1400
Facsimile: 415-439-1500

Attorneys For Plaintiffs and Counter-defendants
BAXTER HEALTHCARE CORPORATION,
BAXTER INTERNATIONAL INC., and
BAXTER HEALTHCARE SA

May 27, 2009

By: /s/ Maureen K. Toohey /s/

Maureen K. Toohey (SBN 196401)
TOOHEY LAW GROUP
One Financial Center, 15th Floor
Boston, Massachusetts 02111
Telephone: (617) 748-5511

COBLENTZ, PATCH, DUFFY & BASS LLP
Howard A. Slavitt (SBN 172840)
Zuzana Ikels (St. Bar No. 208671)
One Ferry Building, Suite 200
San Francisco, California 94111-4213
Telephone: (415) 391-4800
Facsimile: (415) 989-1663

Attorneys for Plaintiff and Counter-defendant
DEKA PRODUCTS LIMITED PARTNERSHIP

May 27, 2009

By: /s/ Michael E. Florey

FISH & RICHARDSON P.C.
Juanita R. Brooks (SBN 75934)
Todd G. Miller (SBN 163200)
Michael M. Rosen (SBN 230964)
12390 El Camino Real
San Diego, CA 92130
Telephone: (858) 678-5070
Facsimile: (858) 678-5099

Mathias W. Samuel (*pro hac vice*)
Michael E. Florey (*pro hac vice*)
60 South Sixth Street, Suite 3200
Minneapolis, MN 55402
Telephone: (612) 335-5070
Facsimile: (612) 288-9696

Limin Zheng (SBN 226875)
500 Arguello Street, Suite 400
Redwood City, CA 94053
Telephone: (650) 839-5070
Facsimile: (650) 839-5071

Attorneys for Defendants and Counter-claimants
FRESENIUS MEDICAL CARE HOLDINGS, INC. AND FRESENIUS USA, INC.

ELECTRONIC FILING DECLARATION OF DAVID K. CALLAHAN, P.C.

I, David K. Callahan, declare as follows:

1. I am a partner at Kirkland & Ellis LLP, and I am Baxter Healthcare Corporation's, Baxter International Inc.'s, and Baxter Healthcare SA's legal counsel in the above-captioned litigation.
2. Pursuant to the Northern District of California Electronic Filing Procedures and General Order No. 45, I attest that Maureen K. Toohey, counsel for Plaintiff DEKA Products Limited Partnership and Michael E. Florey, counsel for Fresenius Medical Care Holdings, Inc. and Fresenius USA, Inc. concur in the filing of this document and have granted me permission to electronically file this document absent their actual signatures.

Dated: May 27, 2009

Respectfully submitted,

Kirkland & Ellis LLP

By: /s David K. Callahan s/
David K. Callahan, P.C. (IL 620227),
dcallahan@kirkland.com

*Attorney for Plaintiffs and Counter-defendants
BAXTER HEALTHCARE CORPORATION,
BAXTER INTERNATIONAL INC., and
BAXTER HEALTHCARE SA*